No. 48173-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Roberto Diaz-Lara,

Appellant.

Clark County Superior Court Cause No. 14-1-01948-3

The Honorable Judge Robert Lewis

Appellant's Opening Brief

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STATEMENT OF FACTS AND PRIOR PROCEEDINGS

At sixteen, in early 2012, J.G. wanted to live with her boyfriend. RP 22, 2353. She was dishonest with her mother about her relationship with him. This included lying about having him in the house when her parents weren't home. RP 2255, 2321, 1446. She told her friends and teacher that her stepfather was molesting her. RP 26, 2275, 2315, 2321.

Roberto Diaz-Lara and J.G.'s mother had been together since 2001, and had a child together. That child, Z.D.G., was 8 when J.G. made her accusation. RP 22, 40, 2346.

Once J.G. told staff at her school that Mr. Diaz-Lara had molested her, both girls were placed into foster care. RP 2180-2081, 2315-2316. They returned to their mother after 5 months, but J.G. did not stay. She soon moved out and got married. RP 2271-2274, 1574.

For a few months, while with her sister in foster care, Z. stated that her father molested her. While she would soon recant, she alleged that her father had touched her breasts, bottom, and vagina, both under and over clothing, multiple times. RP 32-37, 2162, 2191. She told the same story to the doctor who examined her, to her foster mother, and to her school counselor. RP 2060-2061, 2182, 2215, 50-54.

The state charged Mr. Diaz-Lara with six charges: three counts of child molestation 1 relating to J.G., and three counts of child molestation 1 relating to Z.D.G. CP 127-129. The case went to trial twice. The first trial involved all six charges and ended in a mistrial. The second trial involved only the charges relating to Z. CP 1-3, 127-129, 892.

Long before trial, though, Z. had recanted.

She testified at a pre-trial hearing, when she was 10, that her father hadn't touched her inappropriately and that her sister J.G. had confused her. RP 2203-2204, 2212, 2347-2349. She told the court her sister had told her to say falsely that her father he touched her privates and she did. RP 2205, 2216. She said J.G. had told her that her father was a bad person, and for a time she believed it. RP 2214. She described how her older sister started telling her that the way her father touches her is bad when they were both still at home. RP 2222. She said that J.G. began making this point about Mr. Diaz-Lara weeks before J.G. told her story at school. RP 2222-2224. Z. said every time she was in the bathroom before moving to foster care, on a daily basis, that J.G. would come in and talk to her about her father. RP 2224, 2245.

Z. also described an incident when she overheard her grandmother and J.G. talking. She heard her grandmother telling J.G. that since Mr.

Diaz-Lara isn't her biological father, he should not touch or hug her at all. RP 2246.

During her testimony at the child hearsay hearing, and at both jury trials, Z. maintained that her father had not molested her. RP 2242-2243, 2250, 1834, 669-699.

During deliberations at the conclusion of the first trial, the presiding juror sent out a note indicating that the jury was "split," and could "not come to an agreement on any of all 6 counts." CP 879; RP 1399-1402. Over Mr. Diaz-Lara's objection,[1] the court declared a mistrial and discharged the jury. CP 892, 913; RP 1402-1409.

The charges relating to J.G. were severed, and were later dismissed.[2] RP 1413, 2106. At Mr. Diaz-Lara's second trial, the state only pursued the charges relating to Z. CP 1.

In the Information, the state alleged three aggravating factors in connection with each count. CP 1-3. These included allegations that the offenses (a) were part of an ongoing pattern of sexual abuse of a victim

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[1] Initially, defense counsel told the court she wanted deliberations to continue. She then changed her mind and asked for a mistrial. RP 1403-1406; CP 913. She told the court she had not yet consulted with her client. RP 1405-1406. After consulting with Mr. Diaz-Lara, she told the court that he objected to the mistrial. RP 1406. The court specifically found that Mr. Diaz-Lara did not consent to discharge of the jury. CP 892.

[2] The trial court assigned the case involving Z. a new cause number. The original cause number was 12-1-0102-8, and the new cause number was 14-1-01948-3. The trial court ordered that all materials from the earlier file be copied into the second file. CP 22.

under age 18 manifested by multiple incidents over a prolonged period of time, (b) were part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time, and (c) involved an abuse of trust. CP 1-3.

The court did not admit much of the background information about how the allegations came out, or about the many discussions between Z. and her older sister. Both parties agreed that J.G.'s claims about being abused by Mr. Diaz-Lara should not be admitted. RP 669-700, 1444-1464.

The court's reasonable doubt instruction (proposed by the state) included the following language: "If... you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt." CP 932. At the state's request, the court defined a "prolonged period of time" for both applicable aggravators as "more than a few weeks." CP 949. Defense counsel did not object to either instruction. RP 1850-1852, 1970-1975.

This time, the jury reached a verdict. Jurors found Mr. Diaz-Lara guilty as charged, and answered in the affirmative to all of the aggravating factors. CP 952-957. The court sentenced Mr. Diaz-Lara to an exceptional sentence of 154 months on each count. RP 2113, 2129; CP 958-977. The

trial judge further noted that Mr. Diaz-Lara did not have the current or likely future ability to pay any non-mandatory legal financial obligations. RP 2129. Mr. Diaz-Lara timely appealed. CP 978.

ARGUMENT

I. MR. DIAZ-LARA'S SECOND TRIAL VIOLATED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO BE FREE FROM DOUBLE JEOPARDY.

Before the first jury was discharged, Mr. Diaz-Lara personally objected to the court's declaration of a mistrial. RP 1405-1406; CP 892. The court declared a mistrial precipitately, without the consent of either party, and without giving Mr. Diaz-Lara a full opportunity to explain his position. RP 1402-1409; CP 892. The court did not give careful consideration to Mr. Diaz-Lara's interest in having the trial concluded in a single proceeding. RP 1402-1409. Nor did the court consider alternatives to a mistrial. RP 1402-1409. Under these circumstances, the second trial violated Mr. Diaz-Lara's right to be free from double jeopardy. *State v. Robinson*, 146 Wn. App. 471, 479-480, 191 P.3d 906 (2008).

A. Mr. Diaz-Lara's double jeopardy claims may be raised for the first time on appeal, and are reviewed *de novo*.

Courts review double jeopardy claims *de novo*. *State v. Villanueva-Gonzalez*, 180 Wn.2d 975, 979-80, 329 P.3d 78 (2014). Double jeopardy

violations create manifest error affecting a constitutional right, and thus can be raised for the first time on appeal. RAP 2.5(a)(3); *State v. Strine*, 176 Wn.2d 742, 751, 293 P.3d 1177 (2013).

B. By declaring a mistrial and discharging the first jury over Mr. Diaz-Lara's objection, the trial judge infringed his valued right to a verdict from the jury he selected to try his case.

The double jeopardy right[3] protects "the interest of an accused in retaining a chosen jury." *Crist v. Bretz*, 437 U.S. 28, 35-36, 98 S.Ct. 2156, 57 L.Ed.2d 24 (1978). That interest "embraces the defendant's 'valued right to have his trial completed by a particular tribunal.'" *Arizona v. Washington*, 434 U.S. 497, 503, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978) (quoting *Wade v. Hunter*, 336 U.S. 684, 69 S.Ct. 834, 93 L.Ed. 974 (1949)). In this case, the court infringed Mr. Diaz-Lara's right to have his trial completed by the first jury.

Absent the accused person's consent, a judge's discretion to declare a mistrial does not come into play unless extraordinary and striking circumstances exist. *Robinson*, 146 Wn. App. at 479 (citing *State v. Jones*, 97 Wn.2d 159, 164, 641 P.2d 708 (1982)). A mistrial ordered without the defendant's consent is "tantamount to an acquittal," unless justified by manifest necessity. *State v. Juarez*, 115 Wn. App. 881, 889, 64

[3] U.S. Const. Amends. V, XIV; Wash. Const. art. I, §9.

P.3d 83 (2003).

Mr. Diaz-Lara objected to the court's decision to declare a mistrial.[4] CP 892. Accordingly, the discharge functions as an acquittal unless prompted by manifest necessity and the existence of extraordinary and striking circumstances. *Id.; Robinson*, 146 Wn. App. at 479. The court's decision here to declare a mistrial and discharge the jury was not prompted by manifest necessity or the existence of extraordinary and striking circumstances.

Appellate courts consider three factors in assessing a mistrial ordered over the defendant's objection. *Robinson*, 146 Wn. App. at 479-480. In this case, all three factors establish a violation of Mr. Diaz-Lara's double jeopardy rights. *Id.* Accordingly, the trial court's decision declaring a mistrial and discharging the jury is not entitled to deference.

First, the trial court must not act precipitately. Instead, the judge must give both sides a full opportunity to explain their positions.[5] *Id.* Here, the court acted precipitately, and did not provide Mr. Diaz-Lara any

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[4] Although his attorney flip-flopped, Mr. Diaz-Lara's personal objection was made clear to the court. RP 1405-1406. The court found that he did not consent to discharge of the jury. CP 892.

[5] The *Robinson* opinion refers to the positions of "defense counsel and the prosecutor." *Robinson*, 146 Wn. App. at 479–80. Here, Mr. Diaz-Lara personally objected to the trial court's decision to declare a mistrial. RP 1405-1406; CP 892. The objection came before the court discharged the jury. RP 1406, 1408-1409. The court specifically found that Mr. Diaz-Lara did not consent to discharge of the jury. CP 892.

opportunity to explain his position. RP 1406. Given defense counsel's admission that she had not even consulted with her client prior to making her initial statements,[6] the court should have allowed Mr. Diaz-Lara an opportunity to explain his objection. *Robinson*, 146 Wn. App. at 479-480.

Instead, the court entered the order declaring a mistrial and discharging the jury immediately after being apprised of Mr. Diaz-Lara's position. RP 1406. The court's failure to provide Mr. Diaz-Lara a full opportunity to explain his position establishes that the decision was precipitate. *Robinson*, 146 Wn. App. at 479-480.

Other facts also suggest that the court's decision was precipitate under the circumstances. The decision to discharge the jury followed the very first time jurors indicated they were deadlocked. RP 1402-1409. In addition, the prosecutor noted that there had been five days of testimony, with "a lot going on." RP 1403. He described the case as "rather complex." RP 1403. These considerations warranted a more deliberate process, rather than a rush to declare a mistrial. Furthermore, the court erroneously considered itself bound by the jury's belief that it was deadlocked, stating "I think we're stuck with that." RP 1406.[7] The court

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[6] RP 1405.

[7] In addition, when jurors returned to the courtroom , the court asked if the jury had "reached a decision in the meantime," but did not ask if they remained hopelessly deadlocked. This contributed to the court's error: because the state of jury deliberations is ever-changing, prior

(Continued)

did not ask for any argument from the parties on this issue. In fact, "[a] jury's own assessment that it is deadlocked, while helpful, is not controlling." *State v. Labanowski*, 58 Wn. App. 860, 866–67, 795 P.2d 176 (1990), *review granted*, 115 Wn.2d 1027, *aff'd,* 117 Wn.2d 405, 816 P.2d 26 (1991).

The trial court made a precipitate decision. The first factor outlined by the *Robinson* court suggests the court violated Mr. Diaz-Lara's double jeopardy rights by declaring a mistrial over his objection. *Robinson*, 146 Wn. App. at 479-480.

Second, the court must "'accord[ ] careful consideration to the defendant's interest in having the trial concluded in a single proceeding.'" *Id.* (quoting *State v. Melton*, 97 Wn. App. 327, 332, 983 P.2d 699 (1999) (footnotes and internal quotation marks omitted by *Robinson*). This factor is particularly important: a trial judge "must always temper the decision" to declare a mistrial "by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed

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evidence of deadlock is not always dispositive of the jury's present inability to reach a unanimous verdict." *United States v. Byrski*, 854 F.2d 955, 962 (7th Cir. 1988).

to his fate." *United States v. Jorn*, 400 U.S. 470, 486, 91 S. Ct. 547, 27 L. Ed. 2d 543 (1971).

Here, the court did not even mention Mr. Diaz-Lara's "interest in having the trial concluded in a single proceeding," much less give it "careful consideration." *Robinson*, 146 Wn. App. at 479-80 (internal quotation marks and citation omitted); *see* RP 1402-1409; CP 892. The court's failure to acknowledge this important interest means its decision should not be given the usual deference afforded to a trial judge's decision to declare a mistrial. *See Strine*, 176 Wn.2d at 753.

Third, the trial court must consider alternatives to mistrial. *Robinson*, 146 Wn. App. at 479-80. Here, the court did not consider available alternatives. Although the judge mused that another hour wouldn't make any difference,[8] he did not investigate the possibility of giving jurors a break from their deliberations. RP 1402-1409. Nor did he consider allowing deliberations to continue until the end of the day, or into the following day. RP 1402-1409. Nor did the judge consider providing "a carefully neutral" supplemental instruction. *See State v. Watkins*, 99 Wn.2d 166, 178, 660 P.2d 1117 (1983).

For all these reasons, the court's decision declaring a mistrial and

[8] RP 1404.

discharging the jury violated Mr. Diaz-Lara's valued right to have a decision from the jury he selected to try his case. *Jorn*, 400 U.S. at 484. His convictions must be reversed and the case dismissed with prejudice. *Id.; Robinson*, 146 Wn. App. at 484.

II. THE COURT COMMENTED ON THE EVIDENCE, RESULTING IN A DIRECTED VERDICT ON THE TWO "PROLONGED PERIOD OF TIME" AGGRAVATING FACTORS.

The state alleged three aggravating factors for each molestation charge. CP 1-3. Two of the three aggravating factors required jurors to find that each of the three charges were "manifested by multiple incidents over a prolonged period of time." CP 1-3.

The trial court's instruction that a "'prolonged period of time' means more than a few weeks" amounted to an improper comment on the evidence. CP 949; *State v. Brush*, 183 Wn.2d 550, 556-560, 353 P.3d 213 (2015). The state cannot prove the error harmless beyond a reasonable doubt, because the record does not affirmatively show that no prejudice could have resulted. *State v. Levy*, 156 Wn.2d 709, 723, 132 P.3d 1076 (2006).

A. Mr. Diaz-Lara can raise the improper judicial comment for the first time on appeal, and review is *de novo*.

A defendant may raise a claim that the trial court commented on the evidence for the first time on appeal. *Levy*, 156 Wn.2d at 719-20. The

reviewing court presumes judicial comments to be prejudicial, "and the burden is on the state to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted." *Levy*, 156 Wn.2d at 723.

B. The court improperly defined a "prolonged period of time" to mean "more than a few weeks."

The Washington constitution prohibits judges from commenting on the evidence. Wash. Const. art. IV, §16. Whether a jury instruction amounts to a comment on the evidence presents a question of law reviewed de novo. *Levy,* 156 Wn.2d at 721.

Our Supreme Court has held that the instruction given here is a comment on the evidence. *Brush*, 183 Wn.2d at 556-560. The comment prejudiced Mr. Diaz-Lara.

Although the charging language covered several years, the evidence suggested that the molestation could have occurred over the course of a few months. RP 1642-1665; CP 1-3. The time frame was not so long that the jury would necessarily have found it to be a prolonged period of time. Thus, the record does not affirmatively show that no prejudice resulted, and the state cannot meet its burden of proving harmlessness. *Levy*, 156 Wn.2d at 723.

The court's erroneous instruction effectively compelled the jury to find two of the three aggravating circumstances alleged for each charge. Jurors had no choice but to conclude that the abuse occurred over a prolonged period.

The remedy is to vacate the exceptional sentence and remand for resentencing. *Brush*, 183 Wn.2d at 556-560. This is so despite the court's boilerplate finding that "the same sentence would be imposed if *any one of the aggravating factors* is not upheld on appeal." CP 960 (emphasis added). Because the judicial comment infected *two* of the three aggravating factors, the finding does not permit the Court of Appeals to uphold the exceptional sentence. *See State v. Weller*, 185 Wn. App. 913, 930, 344 P.3d 695 (2015), *review denied,* 183 Wn.2d 1010, 352 P.3d 188 (2015). In *Weller,* the trial court's finding that two aggravating factors "independently provided authority" for exceptional sentence was not sufficient to uphold an exceptional sentence. *Id.* This was so because the sentencing court "did not specifically state that it would impose the same [sentence] … based on each of the aggravating factors standing alone." *Id.*

Here, as in *Weller,* the trial court did not specifically state that each aggravator, standing alone, supported the sentence imposed. Accordingly, the sentence must be vacated and the case remanded for a new sentencing

hearing. *Id.; cf. State v. Moses*, 193 Wn. App. 341, 365, 372 P.3d 147 (2016).

III. THE COURT'S "REASONABLE DOUBT" INSTRUCTION IMPROPERLY FOCUSED THE JURY ON A SEARCH FOR "THE TRUTH" IN VIOLATION OF MR. DIAZ-LARA'S RIGHT TO DUE PROCESS AND TO A JURY TRIAL (INCLUDED FOR PRESERVATION OF ERROR).

A jury's role is not to search for the truth. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012); *State v. Berube*, 171 Wn.App. 103, 286 P.3d 402 (2012). Rather than determining the truth, a jury's task "is to determine whether the State has proved the charged offenses beyond a reasonable doubt." *Emery*, 174 Wn.2d at 760.

Here, the court undermined its otherwise clear reasonable doubt instruction by directing jurors to consider "the truth of the charge." CP 11.

A jury instruction misstating the reasonable doubt standard "is subject to automatic reversal without any showing of prejudice." *Id.* at 757 (citing *Sullivan v. Louisiana,* 508 U.S. 275, 281–82, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993)). By equating proof beyond a reasonable doubt with a "belief in the truth of the charge," the court confused the critical role of the jury. CP 11. This violated Mr. Diaz-Lara constitutional right to a jury trial. U.S. Const. Amend. VI, XIV; Wash. Const. art. I, §§21 and 22. It also violated his right to due process. U.S. Const. Amend. XIV; Wash. Const. art. I, §3.

The court's instruction impermissibly encouraged the jury to undertake a search for the truth, inviting the error identified in *Emery*. The problem here is greater than that presented in *Emery*. In that case, the error stemmed from a prosecutor's misconduct. Here, the prohibited language reached the jury in the form of an instruction from the court. CP 11. Jurors were obligated to follow the instruction.

Divisions I and II have rejected a challenge to this language.[9] *State v. Kinzle*, 181 Wn.App. 774, 784, 326 P.3d 870 *review denied,* 181 Wn.2d 1019, 337 P.3d 325 (2014); *State v. Fedorov*, 181 Wn.App. 187, 200, 324 P.3d 784 *review denied,* 181 Wn.2d 1009, 335 P.3d 941 (2014); *State v. Jenson*, 47647-9-II, 2016 WL 3679513, at *1 (Wash. Ct. App. July 6, 2016). A petition for review is currently pending in *Jenson.* Supreme Court No. 93427-4.

Both *Kinzle* and *Fedorov* erroneously rely on *State v. Bennett*, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). The *Bennett* decision does not support Division I's position.[10]

In *Bennett,* the appellant argued *in favor of* WPIC 4.01 (the pattern instruction at issue here), and asked the court to invalidate the so-called

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[9] The issue is pending before Division III. *State v. Muse,* Court of Appeals No. 34056-2-III.

[10] Although the *Jenson* court adopted *Fedorov's* reasoning, it did not cite to *Bennett* in its summary of *Fedorov*. *Jenson*, --- Wn.App at ___.

Castle instruction. *Bennett*, 161 Wn.2d at 308-309. The *Bennett* court was not asked to address any flaws in WPIC 4.01.[11] *Id.*

The *Fedorov* and *Jenson* courts also relied on *State v. Pirtle*, 127 Wn.2d 628, 904 P.2d 245 (1995). In *Pirtle,* as in *Bennett,* the defendant favored the "truth of the charge" language. *Id.*, at 656 n. 3. The appellant challenged a different sentence (added by the trial judge) which inverted the language found in the pattern instruction. *Id.*, at 656.[12] The *Pirtle* court was not asked to rule on the constitutionality of the "truth of the charge" provision.

Neither *Bennett* nor *Pirtle* should control this case. The presumption of innocence can be "diluted and even washed away" by confusing jury instructions. *Bennett*, 161 Wn.2d at 315-16. Courts must vigilantly protect the presumption of innocence by ensuring that the appropriate standard is clearly articulated. *Id.*

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[11] The *Bennett* court upheld the *Castle* instruction, but exercised its supervisory authority to instruct courts not to use it, and to use WPIC 4.01 instead. *Id.*, at 318.

[12] The challenged language in *Pirtle* read as follows: "If, after such consideration[,] you do not have an abiding belief in the truth of the charge, you are not satisfied beyond a reasonable doubt." *Pirtle*, 127 Wn.2d at 656. The appellant argued that the instruction "invite[d] the jury to convict under a preponderance test because it told the jury it had to have an abiding faith in the falsity of the charge to acquit." *Id.*, at 656.

Improper instruction on the reasonable doubt standard is structural error.[13] *Sullivan*, 508 U.S. at 281-82. By equating reasonable doubt with "belief in the truth of the charge" the court misstated the prosecution's burden of proof, confused the jury's role, and denied Mr. Diaz-Lara his constitutional right to a jury trial.

Mr. Diaz-Lara's conviction must be reversed. The case must be remanded for a new trial with proper instructions. *Id.*

IV. IF THE STATE SUBSTANTIALLY PREVAILS, THE COURT OF APPEALS SHOULD DECLINE TO AWARD ANY APPELLATE COSTS REQUESTED.

At this point in the appellate process, the Court of Appeals has yet to issue a decision terminating review. Neither the state nor the appellant can be characterized as the substantially prevailing party. Nonetheless, the Court of Appeals has indicated that indigent appellants must object in advance to any cost bill that might eventually be filed by the state, should it substantially prevail. *State v. Sinclair*, 192 Wn.App. 380, 385-394, 367 P.3d 612 (2016) *review denied,* 185 Wn.2d 1034 (2016).

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[13] RAP 2.5(a)(3) always allows review of structural error. This is so because structural error is "a special category of manifest error affecting a constitutional right." *State v. Paumier*, 176 Wn.2d 29, 36, 288 P.3d 1126 (2012) (internal quotation marks and citations omitted); *see also Paumier*, 176 Wn.2d at 54 (Wiggins, J., dissenting) ("If an error is labeled structural and presumed prejudicial, like in these cases, it will always be a 'manifest error affecting a constitutional right.'")

Appellate costs are "indisputably" discretionary in nature. *Id.*, at 388. The concerns identified by the Supreme Court in *Blazina* apply with equal force to this court's discretionary decisions on appellate costs. *State v. Blazina,* 182 Wn.2d 827, 344 P.3d 680 (2015). Furthermore, "[t]he future availability of a remission hearing in a trial court cannot displace [the Court of Appeals'] obligation to exercise discretion when properly requested to do so." *Sinclair*, 192 Wn. App. at 388.

Mr. Diaz-Lara has been convicted of sex offenses and sentenced to 154 months in prison. CP 958, 961. The trial court determined that he is indigent for purposes of this appeal, and that he is unlikely to be able to pay in the future. RP 2129; CP 980. There is no reason to believe that status will change. The *Blazina* court indicated that courts should "seriously question" the ability of a person who meets the GR 34 standard for indigency to pay discretionary legal financial obligations. *Id.* at 839

If the state substantially prevails on this appeal, this court should exercise its discretion to deny any appellate costs requested.

CONCLUSION

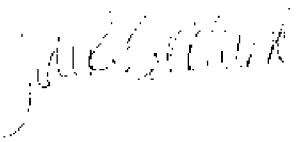
For the foregoing reasons, Mr. Diaz-Lara's convictions must be vacated and the charges dismissed with prejudice. In the alternative, the

exceptional sentences must be vacated, two of the three aggravating factors stricken, and the case remanded for resentencing.

If the state substantially prevails on appeal, the appellate court should decline to impose appellate costs.

Respectfully submitted on August 17, 2016,

BACKLUND AND MISTRY



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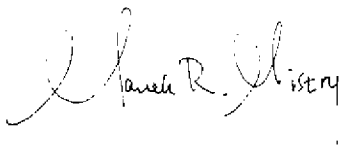

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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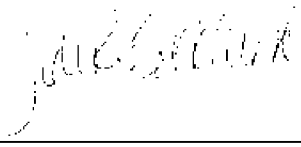
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Clark County Prosecuting Attorney
prosecutor@clark.wa.gov

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on August 17, 2016.



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BACKLUND & MISTRY

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